

September 22, 2009

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**Re:   *State of Delaware v. Penny A. Wilson***  
**Case No.: 0904011788**

**Date Submitted: September 17, 2009**  
**Date Decided: September 22, 2009**

**MEMORANDUM OPINION**

Dear Counsel:

Trial in the above captioned matter took place on Thursday, September 17, 2009 in the Court of Common Pleas, New Castle County, State of Delaware.<sup>1</sup> Following the receipt of documentary evidence and sworn testimony the Court reserved decision. This is the Court's Final Decision and Order.

Penny A. Wilson (the "defendant") or ("Wilson") was charged with one Count of Breach of Release allegedly in violation of Title 11, section 2113(c)(2) of the Delaware Code. According to the Information filed by the Attorney General with the

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<sup>1</sup> While originally scheduled for a jury trial, the defendant entered a signed waiver to the Clerk of the Court to the Bench.

Clerk of the Court, the defendant "... [d]id knowingly and unlawfully fail to comply with a Judges order to wit, did have contact with Maria Waugh in violation of a no-contact order."

### **(I) The Facts**

At trial, Maria Waugh ("Waugh") presented testimony. Waugh works for the New Castle County Police and recalls April 12, 2009, Easter Sunday at 7:15 PM. Waugh was in the parking lot at the Credit Union in New Castle County with her boyfriend waiting to exchange her child with her former boyfriend, Jason who was located across the street in an adjacent parking lot. A diagram marked as State's Exhibit No.: 3 was moved into evidence without objection. State's Exhibit No.: 3 depicted the actual location of the child exchange with Waugh's ex-boyfriend Jason, who had agreed to meet Waugh at approximately 6:50 PM, 1 hour than originally scheduled to exchange their child in common. Waugh's ex-boyfriend arrived at 6:55 PM and Waugh arrived at the Credit Union parking lot at 6:50 PM. When Jason, her ex-boyfriend pulled up, she went across the street to exchange custody of their child as arranged.

According to Waugh, when she returned to the Credit Union parking lot the defendant's car was blocking the entrance way into the Credit Union parking lot. Waugh then video taped the defendant's 2002 Oldsmobile Bravada parked in the entrance way of the Credit Union parking lot. The Court, with counsel and parties present observed the video. According to Waugh, the defendant violated the no-

contact order because she blocked her from returning to her the Credit Union parking lot where she had previously awaited with her boyfriend to exchange custody of their child.<sup>2</sup>

On cross-examination, Waugh testified that the purpose of the visit was to exchange custody of her daughter with her ex-boyfriend Jason. Waugh admitted she attempted to pull back into the credit union parking lot on Elkton Road after she exchanged custody of their child.

The defendant presented her case-in-chief. Penny Wilson (“Wilson”) testified that her son Jason Wilson had a child with Waugh and he requested her presence at the child exchange. Wilson testified that she was present because Waugh has a history of domestic problems with her son. The defense moved into evidence as Defense Exhibit No.: 1 a copy of a picture of the Credit Union parking lot. Waugh testified that she picked the Credit Union parking lot across the street because there is a shed and she could observe without difficulty the child swap and not be “physically present” with Waugh and not be in violation of the temporary No Contact Order. Wilson testified that she pulled into the parking lot and was not aware that Waugh was previously parked inside the Credit Union parking lot. Her purpose originally was

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<sup>2</sup> The State at this time moved into evidence State’s Exhibit No.: 1 and State’s Exhibit No.: 2 without objection. State’s Exhibit No.: 1 was a copy of a Magistrate’s temporary no contact order against Penny A. Wilson where bail was set at \$1,000 secured and prevented Wilson from having contact with Waugh, and not otherwise “be in the physical presences of the alleged victim Waugh”. State’s Exhibit No.: 2 was a copy of a Final Order by Judge William C. Bradley of this Court which occurred after the incident in question, which also set a no contact order as bail conditions with Ms. Wilson and Ms. Waugh “barring Ms. Wilson from having any contact with Waugh.”

to observe the swap from the location, but not to interfere with the exchange of her son's child.

Wilson testified on cross-examination that she had no knowledge that Waugh's car was previously in the Credit Union parking lot and that she had made no contact with Waugh; did not physically exit her motor vehicle; or exchange any language, or verbal communication. Wilson believes she was not in violation of the no contact order. Wilson further testified Waugh pulled out of the parking lot across the street and then came around to where Wilson was now located at the Credit Union. Wilson testified after the child swap she thought Waugh would simply leave the parking lot across the street and travel up Newark-Elkton Road to Newark, and not attempt to enter the Credit Union parking lot. Wilson testified her car stalled three (3) times and that is why it took her so long to leave the premises and "get away" from Waugh as well as comply with the no-contact order. She believes she was there for approximately thirty (30) seconds because of her car stalling three (3) times and she could not get it out of gear.

Wilson further testified she knew about the child swap and knew Waugh would actually be present, but did not believe she was in violation of the no contact order because she was across the street simply observing the child swap 150 feet away and was not "in the physical presence of Waugh."

## (II) The Law

Title 11, Section 2113(c)(2) of the Delaware Code states as follows:

(c) If the accused knowingly fails to appear as required or knowingly breaches any condition of release, each such failure or breach shall be a separate crime, and upon conviction thereof shall be punished as follows:

(2) If the person was released in connection with 1 or more charges of misdemeanor prior to trial, the person shall be fined not more than \$500 or imprisoned not more than 1 year, or both.

Title 11, Section 231 defines knowingly as follows:

(c) “Knowingly”.--A person acts knowingly with respect to an element of an offense when:

(1) If the element involves the nature of the person's conduct or the attendant circumstances, the person is aware that the conduct is of that nature or that such circumstances exist; and

(2) If the element involves a result of the person's conduct, the person is aware that it is practically certain that the conduct will cause that result.

In the instant charge, the State has a burden of proving each and every element of the charging document beyond a reasonable doubt. 11 *Del. C.* § 301; *State v. Matushefske*, Del. Supr., 215 A.2d 443 (1965).

As established case law indicates, a reasonable doubt is not a vague, whimsical or merely possible doubt “but such a doubt as intelligent, reasonable and impartial men may honestly entertain after a conscience consideration of the case. *See, Matushefske*, 215 A.2d at 445.

## **(II) The Law (cont'd)**

The State also has a burden of proof beyond a reasonable doubt that jurisdiction and venue has been proven as elements of the offense. 11 *Del. C.* § 232, *James v. State*; Del. Supr., 377 A.2d 15 (1977); *Thornton v. State*, Del. Supr., 405 A.2d 126 (1979).

In the instant case, it is the clear issue of credibility. As trier of fact, it is the sole judge of the credibility of each fact witness and any other information or testimony provided.

If the Court finds the evidence presented to be in conflict, it is the Court's duty to reconcile these conflicts, if reasonably possible, as to make one harmonious story of it all.

If the Court cannot reconcile the differences, the Court must give credit to that portion of the testimony, which, in the Court's judgment is the most worthy of credit and disregard any portion of the testimony which the Court's judgment is unworthy of credit and disregard any portion of the testimony which in the Court's judgment finds is unworthy of credit.

In doing so, the Court takes into consideration the demeanor of each fact witness, their apparent fairness in giving their testimony, their opportunities in hearing and knowing the facts about which they testified, and any bias or interest they may have concerning the nature of the case.

### **(III) Opinion and Order**

It is clear in the instant case that the credibility, as well as the weight and quality of evidence are equally balanced in this trial record. The Court notes that the trial exhibit, and specifically the Magistrate's Temporary No Contact Order ("State's Exhibit No. 1") which controls the disposition of this matter, does not define the word "physical presence." Counsel for the State and the defense have not offered any case law or statutory definitions for the Court's review and/or consideration. Nor has the Court find any case law on point. Unlike the customary Magistrate's No Contact Orders, the order in question, State's Exhibit No.: 1, which was temporary, simply orders "no physical presence" with no distance in yards or feet specified in the order. It is clear, based upon the testimony that the defendant was more than 150 feet away at the time she parked her motor vehicle in the Credit Union parking lot to observe the child swap. It is also clear that the alleged victim then drove to that location and then filmed the defendant purportedly to depict Wilson in violation of the No Contact Order. However, the alleged victim, Waugh, was the person who came to the defendant's physical presence which, in the Court's judgment, finds is not in violation of the no contact order by the Magistrate with regard to Wilson.

The Court finds the defendant made bona fide attempts to exit that location and was not within the physical presence of Waugh when she watched the child swap at the Credit Union parking lot. As to the credibility of each witness, namely Waugh and defendant Wilson; credibility is equally balanced and the Court is not swayed as to

either party's testimony. The weight of the evidence is also equally balanced. The Court therefore must conclude as a matter of law that the State has not proven the instant charge beyond a reasonable doubt. 11 *Del.C.* §301.

This Court enters a finding of NOT GUILTY.

**IT IS SO ORDERED** this 22<sup>nd</sup> day of September, 2009

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**John K. Welch**  
Judge

/jb

cc: Carmen Brown, Criminal Clerk  
CCP, Division